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Supreme Court, U.S.
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No. 95-1951

In the Supreme Court of the United States

OCTOBER TERM, 1996

ALBERT JOHNSON, PETITIONER

v.

MICHAEL SHEAHAN, JAMES FAIRMAN, AND RAUL ESTRADA, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Respondents miss, by a mile, the import of the Seventh Circuit's novel decision. In every other circuit to have addressed the question, courts hold that allegations of routine cross-gender monitoring of undressed, showering, and defecating prisoners implicate Fourth Amendment, Eighth Amendment, or constitutional privacy rights; and that such infringements are to be weighed against security and other needs of prison authorities to determine if a constitutional violation has occurred. Because petitioner alleged that female guards "constantly supervise" inmates using "open [and] unobstructed" toilet and shower facilities, so that they "view [petitioner] and other inmates in various states of undress" on a "daily basis" (Cmplt. 4B-4C & Exh. 2; App. to C.A. Br. A28), his suit would have survived a motion to dismiss in every other circuit. On motions for summary judgment or at trial, petitioner would have had an opportunity to show that prison authorities could accommodate his privacy interests by making inexpensive, non-disruptive changes in prison facilities (*e.g.*, by installing opaque shower curtains or screens) or in staffing practices.

Expressly rejecting the approach taken by other courts of appeals (see Pet. App. 7a-8a), the Seventh Circuit majority held that the routine surveillance of a naked inmate by guards of the opposite sex *is constitutional per se*, without need for *any* individualized factual inquiry into the reasonableness of the prison conditions and practices that allow this to occur or into the ease with which greater privacy could be afforded. In the Seventh Circuit, complaints about cross-sex surveillance do not even implicate the Constitution; they must be dismissed.

1. Ironically, respondents attempt to mask this circuit conflict by focusing narrowly on the particular facts of cases. Petitioner had no opportunity to develop the facts in this case; his suit was dismissed. The Seventh Circuit did not assess the regularity with which petitioner suffered the

indignity of cross-sex monitoring, conclude that the female guards had a limited or obstructed view of Johnson's naked body, or determine that greater privacy could not be achieved without compromising security or other prison needs. Instead, the court simply held that "[t]he fourth amendment does not protect privacy interests within prisons" (Pet. App. 11a), and that neither substantive due process (Pet. App. 3a-4a) nor the Eighth Amendment (Pet. App. 12a) supplies an alternative basis for a prisoner's privacy claim. The court of appeals' decision was not based on facts, so it cannot be distinguished on facts. Under the reasoning adopted in other circuits, petitioner's suit would have survived dismissal and the case would have been remanded for a factual inquiry. Not a single decision cited by respondents is to the contrary.

2. Contrary to respondents' assertion (Br. in Opp. 5), other circuits quite clearly recognize that routine cross-gender observation triggers Fourth Amendment scrutiny. *Kent* v. *Johnson,* 821 F.2d 1220, 1226 (6th Cir. 1987) (Br. in Opp. 5-6), for example, recognized a "fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex when not reasonably necessary for some legitimate, overriding reason." Concluding that prison authorities had apparently "ru[n] roughshod over the privacy interests and personal dignity of male prisoners" (*id.* at 1227), *the Sixth Circuit reversed the district court's dismissal of the complaint*—a result entirely at odds with the Seventh Circuit's decision here. See also *Hayes* v. *Marriott,* 70 F.3d 1144 (10th Cir. 1995) (reversing summary judgment for defendants on ground that prisoner's Fourth Amendment right may have been violated even if he was observed naked by female guards only once).

Although the court in *Cornwell* v. *Dahlberg*, 963 F.2d 912 (6th Cir. 1992), reversed a jury verdict for the plaintiff (Br. in Opp. 4 n.1), it did so only because the jury had not been properly instructed. In conflict with the decision here,

the court in *Cornwell* held that the prisoner, who claimed that female guards had *watched* while he was strip searched, "raised a valid privacy claim under the Fourth Amendment that was properly submitted to the jury." *Id.* at 916.

Respondents misstate (Br. in Opp. 7) the holding of *Cookish* v. *Powell*, 945 F.2d 441, 446 (1st Cir. 1991). The First Circuit held that Fourth Amendment protection is "available to inmates as to their persons." It recognized that "by * * * 1987, the trend, if not the clearly established law, was that an inmate's constitutional right to privacy is violated when guards of the opposite sex regularly observe him/her engaged in personal activities, such as undressing, showering, and using the toilet." *Ibid.* The conflict between that analysis and the Seventh Circuit's is in no way mitigated by *Cookish*'s conclusion that the search was objectively "reasonable" for purposes of qualified immunity because it occurred in the aftermath of a prison riot. Similarly, in *Covino* v. *Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992), the Second Circuit recognized that inmates "retain a limited right to bodily privacy" under the Fourth Amendment.[1]

3. Respondents are no more successful in explaining away decisions holding that prisoners have a constitutional

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[1] Respondent, like the Seventh Circuit, misreads this Court's decision in *Hudson* v. *Palmer*, 468 U.S. 517 (1984), as holding that the Fourth Amendment affords prisoners no protection at all. This Court's conclusion that the Fourth Amendment does not apply "to a prison cell" (*id.* at 536) refers to the actual *space*, not metaphorically to a prisoner's state of incarceration. See *id.* at 538 ("all searches and seizures of *the contents of* an inmate's cell are reasonable") (O'Connor, J., concurring) (emphasis added); *id.* at 556 (disagreeing with the Court's "conclusive presumption that all searches and seizures of prisoners' *property* are reasonable") (Stevens, J., dissenting) (emphasis added).

"right to privacy" not to be subjected to routine surveillance of intimate bodily functions by guards of the opposite sex.

Respondent would have this Court ignore *Lee* v. *Bratten*, 1994 WL 410888 (4th Cir. 1994) (unpublished opinion), and *Cumbey* v. *Meachum*, 684 F.2d 712 (10th Cir. 1982), apparently because in neither case did the court have reason to consider whether a prisoner's rights ultimately were violated. Br. in Opp. 4 n.1, 8 n.3. But in both cases the court of appeals—faced with allegations virtually identical to those here—recognized that prisoners retain privacy rights and *reversed* the trial courts' summary conclusions that the prisoners' claims were necessarily meritless. *Lee*, 1994 WL 140888, at *3 (allegations were "sufficient to create a genuine issue of material fact" that precluded summary judgment for defendant); *Cumbey*, 684 F.2d at 714 (plaintiff's claim to have been "subject to a 'certain amount of viewing' by female guards does not necessarily fall short of a cognizable constitutional claim"). Petitioner asked the Seventh Circuit for no more.

4. Respondents suggest (Br. in Opp. 3) that cases like *Cornwell* v. *Dahlberg* are inapposite because they address claims that the prisoner was observed naked by opposite-sex guards, not during "routine surveillance," but during a strip search conducted by a guard of the same sex. Such a distinction would not be of consequence to the Sixth Circuit, which recognized generally that "a convicted prisoner maintains some reasonable expectations of privacy while in prison, particularly where those claims are related to forced exposure to strangers of the opposite sex." *Cornwell*, 963 F.2d at 916. In any event, this distinction does not diminish the conflict between the Seventh Circuit and all others: under the reasoning in this case, a prisoner is as vulnerable to

exposure to the opposite sex during strip searches as he (or she) is to routine cross-sex surveillance.[2]

5. Amazingly, respondents pretend that the Seventh Circuit's decision is consistent with cases in which a court, recognizing that a constitutional right is at stake, applies the appropriate constitutional analysis but ultimately rules against the prisoner. But in *Michenfelder* v. *Sumner*, 860 F.2d 328 (9th Cir 1988), the court held—in direct conflict with the Seventh Circuit—that "incarcerated prisoners retain a limited right to bodily privacy." *Id.* at 333 ("Shielding one's unclothed figure from the view of strangers, particularly strangers of the opposite sex[,] is impelled by elementary self-respect and personal dignity"). The court ultimately rejected the prisoner's claim for relief only after examining the particular facts of the case under the analysis prescribed in *Turner* v. *Safley*, 482 U.S. 78 (1987). In *Strickler* v. *Waters*, 989 F.2d 1375 (4th Cir. 1993), the court recognized that "when not reasonably necessary, exposure of a prisoner's genitals to members of the opposite sex violates his constitutional rights." *Id.* at 1387. It affirmed dismissal of the prisoner's claim only because the prisoner had failed to allege that he personally had been unreasonably exposed to persons of the opposite sex and because prison officials had "taken measured precautions" to prevent such exposures. *Id.* at 1388.

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[2] In *Lee* v. *Downs*, 641 F.2d 1117 (4th Cir. 1981), the court found that a female prisoner's privacy rights were invaded when her clothing was removed in the presence of male guards. Respondents believe this case distinct in some critical way from the situation where a prisoner has no choice but to use a toilet that is in full view of a guard of the opposite sex. Br. in Opp. 8 & n.3. They do not explain this distinction, nor can petitioner fathom it.

6. Contrary to respondents' assertion (Br. in Opp. 7, 11), the Seventh Circuit did not correctly apply *Turner*. Far from using the *Turner* analysis to determine whether, on the particular facts, "a prison regulation [that] impinges on inmates' constitutional rights" is nevertheless justified on the ground that it is "reasonably related to legitimate penological interests" (482 U.S. at 89), the court used its own distillation of *Turner*'s factors to hold that petitioner's due process right was not implicated at all—that is, to short circuit the *Turner* inquiry into reasonableness. Moreover, the Seventh Circuit illegitimately substituted its own judgment for that of prison administrators by guessing what the justifications for cross-sex surveillance might be. See Pet. App. 22a (Posner, J., dissenting) ("My colleagues urge deference to prison administrators, but at the same time speak confidently about the costs of redeploying staff to protect Johnson's rights. It would be nice to know a little more about the facts before making a judgment that condones barbarism").[3]

7. The Ninth Circuit has analyzed prisoners' claims of invasion of privacy under the Eighth Amendment. Based upon the record facts, it held in *Jordan* v. *Gardner*, 986 F.2d 1521 (9th Cir. 1993) (en banc), that a prisoner may state an Eighth Amendment claim for relief from an otherwise legal inspection performed by a guard of the opposite sex. In stark contrast, the Seventh Circuit majority concluded that cross-

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[3] Accordingly, the court's confused application of *Turner* does not, as respondents contend (Br. in Opp. 8 n.3), eliminate the conflict between this decision and *Fortner* v. *Thomas*, 983 F.2d 1024 (11th Cir. 1993). There, the court recognized that "a prisoner's constitutional right to bodily privacy" may be infringed by the "involuntary exposure of [genitals] in the presence of people of the other sex" (*id.* at 1030) and remanded the case for a determination as to whether this infringement was justified under *Turner*.

sex surveillance can never be "cruel and unusual punishment"—at least unless malice is proved—because it is not so "intrusive" as to be inhumane and because, in light of justifications nowhere asserted by respondents but simply assumed by the court, it is not "pointles[s]." Pet. App. 5a, 7a. In so holding, Judge Easterbrook explicitly relied on the *dissent* in *Jordan*. Pet. App. 8a. The only distinction that respondents offer between this case and *Jordan* is that the prisoners in *Jordan* were women. Br. in Opp. 9. But the Seventh Circuit's reasoning would apply to cross-gender observation of female prisoners too, as Chief Judge Posner pointed out. Pet. App. 18a.

8. This Court's jurisprudence does not support the Seventh Circuit's ruling that in order to satisfy the mental state component of the Eighth Amendment, a plaintiff must "allege either a particular susceptibility or [a] design to inflict psychological injury." Pet. App. 5a; Br. in Opp. 14.

A prisoner challenging the conditions of his confinement satisfies the Eighth Amendment's mental state component provided he shows "deliberate indifference" on the part of prison officials. *Wilson* v. *Seiter*, 501 U.S. 294 (1991). A different standard applies in excessive force cases. There, a prisoner must show that officers used force "maliciously and sadistically for the very purpose of causing harm." *Whitley* v. *Albers*, 475 U.S. 312, 320-21 (1986). Petitioner's suit is governed by the "deliberate indifference" test, as Judge Posner recognized (Pet. App. 21a): no allegation of malice should have been necessary to survive a motion to dismiss. "Deliberate indifference" requires proof only that the prison official "knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer* v. *Brennan*, 114 S.Ct. 1970, 1984 (1994). Nor should petitioner have been required to allege a "particular susceptibility" to psychological harm from cross-gender surveillance. Pet. App. 5a. Where the

prison conditions complained of affect all prisoners, as they do here, it does not matter whether a prisoner "faces an excessive risk * * * for reasons personal to him." 114 S. Ct. at 1982. The Seventh Circuit majority applied the wrong Eighth Amendment standards.

9. The conflict created by the Seventh Circuit's ruling is clear: only the Seventh Circuit would have upheld dismissal of petitioner's suit. The disarray among the courts of appeals about the source of prisoners' bodily privacy rights, hence about the analysis of claims like petitioner's, is equally obvious and is evidenced by the disagreement between Judge Easterbrook and Chief Judge Posner in this case. The Seventh Circuit's decision also creates serious confusion as to the meaning of this Court's teachings in *Farmer* and *Turner*. As the numerous reported decisions attest, the question presented is a recurring one that continues to divide the courts of appeals and to require the expenditure of significant public resources. The confusion will not abate until this Court steps in.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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